

REPUBLIC STEEL CORP.
AND
BCNR MINING CORP.

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 84-7

Decided March 21, 1984

Appeal from decision of Administrative Law Judge Joseph E. McGuire denying application for review of Notice of Violation No. 82-1-110-2. CH-2-49-R.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Initial Regulatory Program: Generally -- Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally

The owner of a surface coal mining operation who operates a coal refuse disposal area without a permit required by State regulation may properly be cited by OSM for violation of 30 CFR 710.11(a)(2), which requires compliance with State permit requirements.

APPEARANCES: B. K. Taoras, Esq., Kitt Energy Corporation, Managing Agent for BCNR Mining Corp., Meadow Lands, Pennsylvania, for appellants;
Angela F. O'Connell, Esq., Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Republic Steel Corporation (Republic Steel) and BCNR Mining Corporation (BCNR), a wholly-owned subsidiary of Republic Steel, have appealed from a decision of Administrative Law Judge Joseph E. McGuire, dated September 2, 1983, denying their application for review of Notice of Violation (NOV) No. 82-1-110-2.

On February 11, 1982, following an inspection of appellants' underground mining operations, known as the Russellton Mine, owned and operated by BCNR and located in Allegheny County, Pennsylvania, the Office of Surface Mining Reclamation and Enforcement (OSM) issued NOV No. 82-1-110-2 for a violation of 30 CFR 710.11(a)(2) because BCNR was operating a coal refuse area without a permit from the Pennsylvania Department of Environmental Resources (DER), the State regulatory authority. On May 4, 1982, a hearing was held in Pittsburgh, Pennsylvania.

The facts of this case are set forth in Judge McGuire's decision at page 2:

As a result of inspections conducted on January 21 and 26, as well as on February 11, 1982, OSM Inspector John Sulka visited the Russellton Mine and noted a rock storage area at portal 3 (AR [Application for Review] at [2]). That storage area was a disturbed area under 30 CFR 717.11(a)(3) (AR at [2]). On February 18, Sulka issued the NOV for failing to have a permit for operating a coal refuse area and ordered that the violative condition be abated by March 15, 1982 (OSM Exh. 1). ^{1/} Although applicants possessed a variety of other kinds of permits (Tr. 47), there was no current coal refuse area permit at the time the NOV was issued nor at the time of the hearing (Tr. 56). ^{3/}

According to one of the applicants' supervisory employees, the Russellton Mine has been in operation for at least 24 years (Tr. 14) and refuse has been dumped at portal 3 from that time to the hearing date (Tr. 42-45). Sulka also testified that applicants have deposited refuse after the effective date of the Act, May 3, 1978 (Tr. 10, 11, 21).

Portal 3 was a 4- to 5-acre parcel that bordered on a stream and over the years the dumping of refuse by the applicant firms had caused a pile of rock, measuring 30 to 35 feet in height, to accumulate and at some locations the toe of that material was located some 5 feet from that stream (Tr. 9-10).

In 1974, applicants did receive a coal refuse deposit area permit from the regulatory authority, the Pennsylvania Department of Environmental Resources (DER), for the initial phase of its operation. That permit's wording informed the applicant firms that they were required to immediately seek a permit for phase 2, the phase with which this action is concerned (Applicants' Exh. D; Tr. 53-55). A permit for phase 2, although first applied for in 1978 (Tr. 57), has never been issued by DER (Tr. 50, 56).

^{3/} "A person conducting coal mining operations shall have a permit if required by the state in which he is mining * * *." [30] CFR 710.11(a)(2)(i). Coal mining operations include "refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings["], etc. [30] CFR 700.5.

In his decision, Judge McGuire concluded that the regulations of DER require permits for coal refuse disposal areas and that "[r]espondent has shown and applicants have corroborated, that applicants did not have such a

^{1/} Although the NOV is undated, Sulka testified it was issued Feb. 11, 1982 (Tr. 12). The remedial action required was either to obtain a permit or to discontinue use of the rock disposal area and to restore it to a suitable condition.

permit at the time it was cited" (Decision at 3). Judge McGuire held that all other considerations, including the fact that appellants had applied for a permit, were only proper considerations "at a penalty inquiry." Id.

In their statement of reasons for appeal, appellants contend that in view of the fact that they had authorization for phase I of their operations, which included a coal refuse disposal area, and had submitted an application for a permit for phase II, "absent a final determination denying its permit or action by the DER withdrawing its prior authorization to deposit mine rock there, Republic and BCNR are in compliance with § 125.101," the State regulatory requirement, and, therefore, in compliance with 30 CFR 710.11(a)(2) (Statement of Reasons (SOR) at 4). In any case, appellants argue that they have a "vested right" to operate the disposal area since the area "predated the permit requirements." Id. at 5. Finally, appellants note that on December 20, 1980, the Pennsylvania Environmental Quality Board adopted regulations which would rescind Chapter 125, including the permit requirement, after publication of notice of the grant of primary jurisdiction over surface coal mining and reclamation to the State pursuant to the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1201-1328 (Supp. V 1981), and that, on July 30, 1982, OSM approved the grant of primary jurisdiction to the State. Appellant argues that, although Chapter 125 had not been rescinded at the time of the violation, it was "unreasonable" to require compliance in view of such pending rescission. Id. at 6. Appellants point out that DER had stopped processing permit applications under these circumstances (Tr. 65).

[1] As noted, supra, the applicable regulation, 30 CFR 710.11(a)(2), provides, in relevant part, that a person conducting coal mining operations, including the operation of a coal refuse disposal area, "shall have a permit if required by the State in which he is mining." (Emphasis added.) The record indicates that Pennsylvania did require, at the time appellants were issued NOV No. 82-1-110-2, a permit for operation of a coal refuse disposal area. The provisions of 25 Pa. Admin. Code § 125.101(a), adopted May 17, 1973, state that: "From the effective date of this regulation, no person shall establish or operate a coal refuse disposal area * * * without first having obtained a permit from the Department under the provisions of the Air Pollution Control Act of January 8, 1960, P.L. 2119, as amended (35 P.S. 4001 et. seq.)." (Emphasis added.)

Appellants do not contest Judge McGuire's conclusion that they operated a coal refuse disposal area without a permit after promulgation of the above-cited regulation. Rather, appellants argue that operation of the coal refuse disposal area was authorized pending approval of their permit application, and that, thus, they were in compliance with the State requirement. Appellants state that: "The existence of a regulation requiring a permit is not necessarily controlling. If such a regulation was not being enforced or if other authorizations were accepted by the state in lieu of a permit, then the requirement of § 710.11(a)(2) would be met" (SOR at 3).

There is some confusion in the record as to the nature of the authorization which permitted appellants to operate the coal refuse disposal area. The September 1983 decision of Judge McGuire indicates that he was under the impression that appellants had received a "coal refuse deposit area permit"

from DER in 1974 "for the initial phase of its operation" (Decision at 2). The record indicates that no such permit was issued. The State regulations provide that, following submission of a permit application, if DER determines that the information required with the application is complete "the applicant shall be notified in writing that the site approval is granted for the purpose of developing a detailed design plan and operations plan." 25 Pa. Admin. Code § 125.102(g)(1).

Effective May 22, 1967, Republic Steel was issued permit 466 MO 48 authorizing the operation of the Russellton Mine (Exh. F). In January 1974, Republic Steel filed a permit application for a coal refuse disposal area (Exh. E). By letter dated December 9, 1974, DER informed Republic Steel of the following:

The Division of Solid Waste Management has completed the review of your Phase I submittal for Permit for Coal Refuse Disposal Facility at the above mentioned site. The material reviewed includes: (1) Application for Coal Refuse Disposal Permit; (2) Affidavit; (3) Coal Refuse Modules 2 thru 5 * * *.

Site approval is granted for the above noted Coal Refuse (Mine Rock) Disposal Area. This approval is granted for the purpose of developing a detailed design plan and operational plan. This approval is further predicted [sic] on the fact that only mine rock will be deposited at this site.

Part II of the application must now be submitted. Part II: Design Plan and Operational Plan (Modules 6 thru 12) are enclosed.

However, no permit for operation of a coal refuse disposal area in connection with the Russellton Mine was issued to Republic Steel. DER merely granted "[s]ite approval."

We believe that the applicable State regulation, 25 Pa. Admin. Code § 125.101(a), clearly provides that operation of a coal refuse disposal area without having first obtained a permit is a violation of State law. Appellants have presented no evidence that the mere filing of a permit application is sufficient compliance or that site approval or any other administrative practice in Pennsylvania permits operation of a coal refuse disposal area pending issuance of a permit. 2/ See Tr. 23-24. Moreover, we cannot conclude that lack of enforcement on the part of DER constitutes implicit authorization in the face of the clear wording of section 125.101(a).

Appellants also argue that they have a vested right to operate a coal refuse disposal area. We disagree. We note that appellants' mining operation, including operation of the disposal area, predates not only SMCRA, but the State regulatory requirement. However, that requirement specifically applied to the operation of coal refuse disposal areas which predated adoption

2/ It would appear that site approval itself merely constituted an administrative conclusion as to the completeness of the permit application and did not sanction the operation of a coal refuse disposal area.

of the requirement. Section 125.101(b) provides that: "Within six (6) months from the effective date of this regulation any person or municipality currently operating a coal refuse disposal area on the effective date of the regulation shall apply for a permit under this Act and under the Clean Streams Law." Accordingly, appellants are not excused from compliance with the State permit requirement merely because their mining operations predate that requirement. We must conclude that appellants violated 30 CFR 710.11(a)(2), which incorporates that requirement, by continuing to operate the disposal area absent a permit.

Appellants assert that the probable assumption by the State of primary jurisdiction over surface coal mining operations on State lands caused DER to defer consideration of pending permit applications. We note that on December 20, 1980, DER published in the Pennsylvania Bulletin an order of the Environmental Quality Board which, in part, "rescinds and repeals * * * [Chapter] 125 (relating to coal refuse disposal areas)" and adopts a new Chapter 90, as part of a State program to be submitted for Federal approval. Pa. Admin. Bull. 4789 (Dec. 20, 1980). The order further stated that:

Immediately upon the granting of primary jurisdiction to the Commonwealth of Pennsylvania by the Secretary of the United States Department of the Interior, the Chairman shall publish notice thereof in the Pennsylvania Bulletin. The regulations adopted by this order and the rescissions and repeals shall become effective upon publication of said notice.

Id. at 4790.

We note that primary jurisdiction was conditionally granted to Pennsylvania effective July 31, 1982. See 47 FR 33050 (July 30, 1980). Accordingly, rescission of Chapter 125 and adoption of a new Chapter 90, relating to coal refuse disposal areas, took place sometime thereafter. However, the regulations in Chapter 125 were in effect when NOV No. 82-1-110-2 was issued. By continuing operation of the disposal area in the absence of a valid State permit, appellants failed to comply not only with the State regulatory requirement but 30 CFR 710.11(a)(2), for which they were properly cited by OSM. We conclude that Judge McGuire properly denied appellants' application for review of NOV No. 82-1-110-2.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Will A. Irwin
Administrative Judge

We concur:

Wm. Philip Horton
Chief Administrative Judge

Bruce R. Harris
Administrative Judge

